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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 221.

FREDERICK J. SCHICK, PLAINTIFF IN error,
v
THE UNITED STATES. } No. 222.

WILLIAM BROADWELL, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 223.

LEO. W. MCCRAY, PLAINTIFF IN ERROR,
v.
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SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

LEO. W. MCCRAY, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 301.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

I. RESPECTING JURISDICTION.

These cases were all proceedings to recover a penalty, incurred under section 11 of the oleomargarine act.

The Cliff, Broadwell, and Schick cases were instituted by information, and a stipulation was filed, whereby a trial by jury was waived.

The McCray case was instituted by petition. The defendant filed an answer, to which the plaintiff demurred, and the demurrer was sustained by the court.

As to the nature of an information to recover a penalty—whether civil or criminal.

A penal *action* is defined to be the civil suit brought for the recovery of a statutory forfeiture when inflicted as a penalty for an offense against the public. (16 Ency. Pl. and Prac., p. 231, and cases cited.)

In *Atcheson* v. *Everett* (1 Cowp., 382) Lord Mansfield said:

> There is no distinction better known than the distinction between civil and criminal law; between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguished between them. *Penal actions were never yet put under the head of criminal law or crimes.* * * * It is as much a civil action as an action for money had and received.

Informations to recover penalties and forfeitures seem to have been recognized as civil proceedings by this court, although in *Ex parte Wilson* (114 U. S., 417) the fact was noted that in recent years *prosecutions* by information have greatly increased.

In *Clifton* v. *United States* (4 How., 242), the court said that an information for a forfeiture "is in the nature of a criminal proceeding," and for that reason held that one good count was sufficient to support a verdict and judgment upon all the counts, though some were bad. In *Snyder* v. *United States* (112 U. S., 216), it was held that while informations under the revenue laws are not strictly criminal cases, but are civil actions, yet "they are so *in the nature* of criminal proceedings as to come within the rule that a general verdict, upon several counts seeking in different form one object, must be upheld if one count be good." [Citing *Clifton* v. *United States*, 4 How., 242, 250.]

A distinction is thus indicated between such informations and those for the recovery of a penalty; in the one case the proceeding being *in rem* and in the other *in personam*.

The statutes also seem to make a distinction between penalties and forfeitures on the one hand and criminal offenses on the other (secs. 1044, 1046, 1047, R. S.), and the oleomargarine law appears to notice the legal distinction between a fine and penalty (secs. 4, 6, 7, 9, 12 *et seq*); but in view of the word "offense" in section 11 of the oleomargarine act, there is ground for saying that the penalty which it provides was imposed as a fine for the violation of what is made a misdemeanor.

If an information to recover a penalty be a civil action, trial by jury in these cases could have been waived; but in the absence of an agreed statement of facts, how far are the judgments therein open to review?

In *Henderson's Distilled Spirits* (14 Wall., 33), the court said:

> Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury, and submitted the case to the court *upon an agreed statement of facts*, as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.

In *Rogers* v. *United States* (141 U. S., 548) the parties filed a written stipulation waiving the right of trial by jury, and the court filed findings of fact, which stated that it had "heard the testimony of the witnesses." Upon these findings judgment was rendered for the United States. This court said:

> The circuit court could not properly consider *any of the matters raised by the bill of exceptions;* nor can this court do so. All that the circuit court could do was to affirm the judgment of the district court; and all that this court can do is to affirm the judgment of the circuit court.
>
> * * * * *
>
> *Without considering any questions on the merits*, the judgment of the circuit court is therefore affirmed.

It may be doubted, however, whether, in the *Rogers* case, the court intended to be understood as holding that no question of law presented by the record in a civil case, tried by the court without an agreed statement of facts, could be reviewed on error, even if that question appeared independently of any issue of fact decided by the court. The court did not, in the present cases, make any findings of fact, there being no dispute as to the matters of fact out of which the constitutional questions arose. In the *Rogers* case, the particular question of law presented for determination rested upon the disputed fact, found by the court, that the bond sued on was given voluntarily. Here, the constitutional questions are distinctly presented in the several motions to find the defendant not guilty, as well as in arrest of judgment, and resting as they do upon undisputed facts, would seem to be open to review, the court confessedly having jurisdiction.

Trial by jury in criminal cases—when a constitutional right.

Treating the present proceedings by information as criminal actions, it seems proper to consider, at the outset, in what cases trial by jury is a matter of constitutional right.

The authoritative decision on this question is *Callan* v. *Wilson* (127 U. S., 540). In that case,

Mr. Justice Harlan, delivering the opinion of the court, said (p. 552):

> According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily and without a jury; and in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused.

The opinion proceeds to cite State authorities [among others *Byers* v. *Commonwealth*, 42 Pa.; see reference thereto in Mr. Guthrie's brief on jurisdiction, p. 10] which recognize the extensive and summary power constantly exercised in the States for the repression of breaches of the peace and petty offenses, which is not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury. It is true that these cases are based upon particular State laws, and that the offenses principally in mind are those which violate various municipal regulations.

The doctrine which that case establishes is that those misdemeanors of a *serious* character which were triable by jury at common law, and which involve a deprivation of the liberty of the citizen, must, as a matter of constitutional right, be tried by jury in courts of the United States.

Assuming that section 11 of the oleomargarine act makes the act of purchasing or receiving oleo-

margarine which has not been branded or stamped as required by law a misdemeanor, it can hardly be classed, like the offense of conspiracy, involved in *Callan* v. *Wilson*, among those crimes the nature and consequences of which are so serious as to entitle a person accused thereof to trial by jury.

In *Brewster* v. *The People* (183 Ill., 143), in which it was held that, in view of the peculiar wording of the State constitution, the right of trial by jury in the case of a misdemeanor, punishable only by fine and imprisonment, could be waived, the court said:

> "No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common-law court, after the accused was in custody, had been arraigned, and had pleaded [not] guilty to the indictment." (*People* v. *Fisher*, 20 Barb., 656; *People ex rel.* v. *Justices*, 74 N. Y., 406; *State* v. *Conklin*, 27 Vt., 319.) As jury trials in criminal cases, as known to the common law, were such as followed upon indictment in a common-law court, and as our Constitution refers to the right of trial by jury, as it was understood at common law, then the prohibition against the right to waive a trial by jury can not apply to misdemeanors, because the Constitution expressly provides that, in cases of misdemeanors, a person may be held to answer without indictment.

It is doubtless proper to observe that the practice in the district courts of the United States has been

to try all criminal cases, whether felonies or misdemeanors, by jury. Those courts have no jurisdiction of municipal offenses, such as were referred to in *Callan* v. *Wilson* as those in which trial by jury would not be a matter of constitutional right. In that case the court was confronted with the peculiar situation which exists in the District of Columbia, where the courts of the United States exercise both a general and a municipal jurisdiction. And it is also true that there is no Federal statute expressly authorizing waiver in criminal cases like the State statutes of that kind.

It is also to be observed that Mr. Justice Story, in *United States* v. *Gibert* (2 Sumn., 19; Fed. Cas. No. 15204), was of opinion that in the case of a misdemeanor there never could be any other trial than by jury. The charge in that case was robbery on the high seas.

In the case of *Bonner* (151 U. S., 242) the view was expressed that the trial of a criminal case in a Federal court could be in no other way than by jury. The charge in that case was larceny.

As to waiver.

In *United States* v. *Taylor* (11 Fed. Rep., 470) an information had been filed in the district court for the district of Kansas, charging the defendant with the offense of carrying on the business of a retail liquor dealer without having paid the special taxes required by law. In the course of the trial the court directed the jury to return a verdict of

guilty. This was held to be error by the circuit court, which, in the course of its opinion, referring to the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed guaranteed by the sixth amendment, said:

> This is a right which can not be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous.

It seems that the contrary view as to the right of the court to direct the jury to return a verdict against the defendant had been announced by Mr. Justice Hunt in the case of *United States* v. *Anthony* (11 Blatchf., 200). But Judge McCrary, in commenting on that case, remarks that Judge Hunt seems himself to have doubted the soundness of the ruling, because upon a subsequent trial for the same offense a verdict of guilty was not ordered and the case was submitted to the jury; and it should be observed that Judge McCrary also states that he had consulted Mr. Justice Miller, who authorized him to say that the learned justice concurred in the conclusion which Judge McCrary reached.

United States v. *Shaw* (59 Fed. Rep., 110), however, distinctly asserts the right of an accused person to waive trial by jury. The court said:

> Many of the cases where the right of the accused to consent to the discharge of a juror is denied were those where the accused

was being tried for murder, and there might be capital punishment. (See *Cancemi* v. *People*, 18 N. Y., 128; *Territory* v. *Ah Wah*, 4 Mont., 149, 1 Pac., 732; *Hill* v. *People*, 16 Mich., 354.)

In the case under consideration the offense charged, of which the defendant has been convicted, is declared by the statute to be a misdemeanor; and had the juror Pendleton been discharged by the court with the consent of the defendant, we are of opinion that both reason and the weight of authority would have sustained the action of the court, and the discharge would not have been a legal ground for a new trial. (See *Tyra* v. *Com.*, 2 Metc. (Ky.), 1; *State* v. *Kaufman*, 51 Iowa, 578; *Com.* v. *Dailey*, 12 Cush., 80.)

In the *Belt case* (159 U. S., 95) it appeared that the supreme court of the District of Columbia had sustained the constitutionality of an act of Congress providing that in prosecutions in the police court of the District, in which, according to the Constitution, the accused would be entitled to a jury trial, the accused might in open court expressly waive such a trial and request to be tried by the judge. This court did not, however, pass upon that question, holding that the only question presented was as to the jurisdiction of the supreme court of the District to decide the matter, which it upheld. In that case, however, the court refers to *Hallinger* v. *Davis* (146 U. S., 314, 318), in which it was said:

> Upon the question of the right of one charged with crime to waive a trial by jury and elect to be tried by the court, when there is a positive legislative enactment giving the right so to do, there are numerous decisions by State courts upholding the validity of such proceeding.

In *Hallinger* v. *Davis* it is to be observed that the court was passing upon a State law authorizing a jury trial to be waived, and upheld it although the crime was capital.

In *Thompson* v. *Utah* (170 U. S., 343) the court, speaking by Mr. Justice Harlan, said (p. 353):

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of *felony*, by consent expressly given, or by his silence, to authorize a jury of only eight persons to pass upon the questions of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

The inference from this adjudication is that in cases of felony trial by jury can not be waived; for if an accused can not consent to be tried by less than twelve jurors, he can not consent to dispense with a jury altogether.

The ruling in *Thompson* v. *Utah*, as shown by the reference therein to the *Hopt case* (110 U. S., 574), proceeds upon the theory that the accused is not the only one concerned in the manner of his trial, but that society in general is interested in all proceedings that affect or destroy either the life or liberty of its members.

The language of the third article of the Constitution is imperative—"the *trial* of all crimes, except in cases of impeachment, *shall* be by jury." The *right* of trial by jury was protected in the sixth and seventh amendments. They provide respectively:

Sixth amendment.

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh amendment.

> In *suits at common law*, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

In *Bank of Columbia* v. *Okely* (4 Wheat., 244) the court, in holding that the defendant could properly be held to have waived his right to a trial by jury in that case, a civil suit, said:

> That this view of the subject is giving full effect to the seventh amendment of the Constitution is not only deducible from the general intent but from the express wording of the article referred to. Had the terms been that "the *trial* by jury shall be preserved" it might have been contended that they were imperative and could not be dispensed with, but the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished.

May not the same idea be attributable to the *Sixth* Amendment; and is it not therefore permissible, in dealing with a minor offense, as here, to waive the right, without contravening the general and imperative provision of the Constitution itself as to *serious crimes?*

As to the suggestion that the defect, if one exists, is matter of procedure, and does not constitute a vital lack of jurisdiction, I submit whether the question of waiver here may not be held similar to that raised in the *Maxwell cases*, wherein the question is put in this form: "Is the judgment of the court, not being based on the verdict of a jury, a nullity, or is a trial by the court without the

waiver of a jury at most only error?" (*Maxwell* v. *Stewart*, 21 Wall., 71; 22 Wall., 77; *Humphreys* v. *District of Columbia*, 174 U. S., 195.)

The McCray case properly before the court.

Whatever the fate of the proceedings by information, the McCray case would appear to be properly before the court. That case is civil in form as well as in substance; and, having been decided upon demurrer to the answer, no question as to trial by jury is presented. The vital question in all of these cases, namely, the constitutionality of the act, may therefore in any event be determined by the court, in the light of those facts of which it can take judicial notice.

II.—ADDITIONAL REMARKS UPON THE MERITS.

The reply brief.

Judge Cooley in *Constitutional Limitations* not only says that not everything which may be done under the name of a tax is not necessarily a tax, but also that (p. 593):

> The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restriction whatever except such as rest in the discretion of the authority which exercises it.

The context shows that the abuse which he is deprecating is the levying of a tax for private benefit in reality, although ostensibly for public objects.

The learned gentlemen are mistaken in saying that I have fallen into serious error as to the law of Illinois. The law which I quoted is on the statute books of that State, and shows the intent of its legislature and how completely that body was intending to carry out the will and policy of the people. Counsel unwarrantably state that Illinois "does not prohibit, but *freely permits*" the manufacture and sale of colored oleomargarine, because in one case in a court of that State (not the supreme court), initiated by the same oleomargarine manufacturer, who is the real complainant here, the prohibitive feature of the State law was declared to be unconstitutional. And another case is cited in which the ground of decision was that the suit was a collusive one between two dealers in oleomargarine.

As to the remainder of the act, which Mr. Guthrie says is found to afford adequate protection to the public against injury, it is to be observed from his abstract "that no person shall be allowed to have in possession or under control any package of oleomargarine except for personal consumption or that of his family." If this section does not mean to strike at the deception in houses of public entertainment and does not justify the distinction which I have noted between a sale possibly open and fair and an illicit use between the sale and the consumption by which the real consumer unknowingly receives the article as butter, I am unable to see what its purpose is.

There is no change of front in the Government argument. It was never admitted by the Government that the tax is prohibitory or destructive. Nevertheless the Government's formal position, sustained by the lower court, that evidence to that effect was immaterial, was and is correct. Yet the Government now has a perfect right upon these records to argue that the tax does not amount to prohibition or destruction.

On pages 14 to 18 of the reply brief counsel appear to think that they have directed a destructive criticism against the Government figures showing that the injury to the colored oleomargarine business has not been excessive. They charge that the Government excluded uncolored oleomargarine from the total production under the old act (which is *not* the fact), and then proceed to do exactly the same sort of thing which they unwarrantably charge the Government with doing—that is, they impressively allege that there has been a falling off from 123,000,000 pounds in production to 2,700,000 pounds, or nearly 98 per cent, but studiously exclude the 68,000,000 pounds of uncolored oleomargarine which were produced during the period under review.

The whole import of the opposing argument is that oleomargarine is only oleomargarine when it competes with butter; in other words, when it is colored; that when it is uncolored, in its natural state, it is really not oleomargarine at all. Concealed in all this there is the simple demand that

the oleomargarine interests shall be left free to compete with butter.

Now observe how counsel argue both that there was and that there was not such an article as uncolored oleomargarine before the present law. At one point they manifestly contemplate the uncolored article as existing and produced under the old law. They show this contemplation more clearly when they say the one-fourth cent tax is a new levy on a *hitherto* untaxed article—"an article *theretofore* free from any tax;" and they immediately proceed to state, with the idea of showing that the tax on the uncolored article is a new tax and no tax on that article was ever imposed before, and the Government's claim of reduction of tax on the uncolored article is erroneous, that all oleomargarine, "*properly so called*," was sold as a substitute for butter, and that therefore it had to be colored as butter to meet the consumer's demands. In other words, the only possible meaning of this claim is clearly antagonistic to what has preceded, that all oleomargarine before the new act was passed was colored, and that there was then no such thing as uncolored oleomargarine. And if the latter contention is the real one, and if that was indeed the fact, then manifestly they were proceeding in defiance of State laws.

It is, of course, impossible to maintain that uncolored oleomargarine was unknown before the law of 1902 was enacted (see *post*). But either

there was or there was not uncolored oleomargarine prior to July 1, 1902. If there was, then it was taxed at 2 cents per pound, and the present tax is a reduction. If there was not, then the Government figures as to the total production are not subject to the untenable challenge which counsel make, and the present falling off in production is as the Government states and not as counsel seek to show. In any case it seems plain to me that Mr. Guthrie has entangled himself in the same dilemma which he seeks to cast around the Government (pp. 15–17, reply brief).

I remark that Mr. Guthrie's own brief in the second case of *Collins* v. *New Hampshire*, involving a later New Hampshire law, heard at October term, 1901, and affirmed by an equally divided court (187 U. S., 636, 637), speaks of colored oleomargarine and *uncolored* or *white* oleomargarine.

The words "regulatory tax" referred to by counsel were only used in the Government's brief in referring to certain remarks in the Senate debate, and were simply transferred from the language there used. The Government does not call this a *regulatory* tax, except in so far as appears in *In re Kollock*, and this word was not intended to import and does not import any illegitimate regulation of State commerce.

I am entirely unable to comprehend what counsel means when asserting that the higher rate affords no such protection against evasion, as the argument in the Senate suggested. They say,

"On the contrary, the increased gain to such offenders by reason of the higher rate would only be a so much greater incentive to offend." The force of that observation escapes me, because I can not understand how the higher rate would be an increased gain to offenders, unless it is meant that some persons would proceed to offend notwithstanding the law, and would be successful in passing off their product as butter, and thus escape even the one-fourth cent tax.

The difference between oleomargarine and butter is difficult to detect, not "because they are practically the same, contain the same ingredients, and are equally palatable, digestible, and wholesome." Counsel can not justify this statement by the insertion of the word "practically;" they do not contain the same ingredients; they do not even contain the same chemical elements, except in part, and few people, I imagine, upon an *experimentum in corpore vili*, would testify that they are *equally* palatable, digestible, and wholesome; although it may possibly be (the proposition is disputed) that oleomargarine is palatable, digestible, and wholesome. The difference is difficult to detect simply because the *physical appearance* of the two articles—butter and colored oleomargarine—is practically the same.

Counsel, pursuing the suggestion of *reductio ad absurdum*, uses another two-edged word when he characterizes a part of the Government argument as "preposterous" (p. 20). Counsel can not affect

to misunderstand what the Government brief meant when it spoke about the colored article as inevitably imitative and fraudulent in effect. The statement could not possibly be misinterpreted as referring to anything else than butter in suggesting imitation. And so counsel, after the dialectical play, concludes with a second assertion of the utter fallacy of the Government's reasonable suggestion that the high tax on the colored article would naturally tend to prevent its escaping all tax because it counterfeited the untaxed article, butter.

I presume that counsel in their conclusion on this matter (p. 21, reply brief), saying "in order to facilitate the collection of revenue on *colored* oleomargarine," do not intend to misstate the word, since they are perfectly well aware that it is the collection of revenue on *uncolored* oleomargarine which may be thus facilitated and protected.

Counsel say, in arguing that the court will not uphold this tax as seeking "to *destroy* a counterfeit or imitation of an *untaxed* article," and that the fraud practiced has been with respect to butter—that "in view of the strict supervision exercised by the Government over manufacturers it is unreasonable to suppose that the payment of taxes could be evaded because of the resemblance to butter, *or that Congress intended to strike at any such evil.*" But counsel plainly themselves suppose that Congress intended to strike at the evil; otherwise they would not have pointed out the debates to the court, which was done to inform

the court that the motive of Congress was to strike at the evil, and was unwarrantable and unjust. But here, it may be, they refer to the evil of thus evading the tax, and not the evil of imitating butter, considered by itself.

The customs decisions which counsel cite, holding that under a law which continued the precarious color standard as to the quality of sugar the later and more accurate and scientific polariscopic test could not be required by Treasury regulations, are not applicable. Here there is no such defective legislation of Congress, and the law does not permit such an evasion of this act, because if there is any artificial coloration, oleomargarine being naturally white, though not pure white, the determination of the question is legally conferred upon the Commissioner. Here the law expressly says that if the goods are manufactured in a certain way, the burden of the high duty rests upon them. There is no ambiguity which calls into effect a Department regulation of doubtful validity, but the law itself makes the regulation. The Commissioner is not altering or enlarging the law by a regulation, but he simply decides the question of coloration under an explicit authority conferred by the law.

The facts and figures again.

It was argued that the Government having, by the reference to the remarks of certain Senators made during the debates on the amendment (Government brief, p. 63), opened the door to a general

reference to the debates, the plaintiffs in error are entitled to make general reference thereto in order to show the intention of Congress in imposing this tax.

But the remarks of the Senators to which attention was directed by counsel for the Government were made in support of the proposition that Congress had the legal right to impose the tax; and in suggesting this argument in the brief I did not show the motives or mere opinions of the legislators. Mr. Guthrie's own reading from the debates shows the strength of the legal argument made by a distinguished Senator and lawyer for sustaining the higher tax on the colored article to prevent the easy evasion of the tax on the uncolored article, by reason of the resemblance to the untaxed article—butter—that is, to prevent evading the payment of any tax at all.

The difficulty with counsel for plaintiffs in error in arguing (brief in reply, p. 16) that the ¼-cent tax was not a reduction, but a new tax on a theretofore untaxed article is that they frequently collide with their own arguments as I have already endeavored to show. Thus, on page 14 of their principal brief, as showing the history of the manufacture of oleomargarine, they refer the court to the Ency. Brit., vol. 17, p. 760; Cent. Dic. and Cyc., vol. 5, p. 4101. They might also have cited Ency. Brit., vol. 4, p. 592; Cent. Dic. and Cyc., vol. 1, p. 738; and Stand. Dic., vol. 2, p. 1225.

These books of reference cited by opposing counsel show that originally there was a wide distinction between oleomargarine as it was then known and what they now claim it *to have been*. Originally oleomargarine was made from the leaf or caul fat of cattle, and "imitation butter" or "butterine" (now included under the term "oleomargarine") was made by churning *with oleomargarine*, milk, cream, or butter, so as to make an imitation butter; or, as it was then commercially known, "imitation butter" or "butterine." These distinctions apparently existed at the time of the passage of the oleomargarine act in 1886, for each is specifically named in the second section thereof. That section provides, "That for the purposes of this act," "all substances heretofore known as oleomargarine, * * * butterine, lardine, suine," etc., "shall be known and designated as oleomargarine." From this it seems clear that the substance *which is now claimed to have been oleomargarine* was, at the time of the passage of the act of 1886, *commercially known* as "butterine" or "imitation butter." Even now there is a distinction between the legal and the commercial meaning, for Dadie says (Cliff Rec. pp. 18, 19) that while legally it is called "oleomargarine," "in trade it is known as butterine."

So when counsel assert that prior to the passage of the amendment of May, 1902, there was no substance embraced within the term "oleomargarine" as defined in the original act, free from artificial

coloration, they squarely contradict the historical facts to which they have called attention. So far is it from the truth that the uncolored article was not being manufactured and would have been exempt from tax had it been manufactured, that it was the *one* substance known at the time of the passage of the act as *oleomargarine*, and formed the basis of all other similar substances used as a substitute for butter, and which were afterwards, by the express language of the act, designated, for the purposes of taxation, as oleomargarine.

It was urged that the act was not a revenue act, because the revenue produced under its operation was but trifling. In answer to this claim we call attention to the report of the Commissioner of Internal Revenue for the year ending June 30, 1903. Upon pages 158 and 159 of the report is this information:

Taxes collected on colored oleomargarine, at the rate of 10 cents per pound	$272,044.48
Taxes collected on uncolored oleomargarine, at the rate of one-fourth cent per pound	171,227.48
License taxes:	
Manufacturers	19,900.00
Retail dealers in colored oleomargarine	73,638.25
Retail dealers in uncolored oleomargarine	107,159.36
Wholesale dealers in colored oleomargarine	30,538.16
Wholesale dealers in uncolored oleomargarine	58,988.72
Total revenue	736,783.31

The table also shows that there were imported during the year nearly 22,000 pounds of oleomarga-

rine, upon which a tax of 15 cents per pound was paid.

Upon pages 154 and 155 of the report the total production for the year is shown to be:

Uncolored oleomargarine	pounds	67,573,689
Colored oleomargarine	do	5,712,257
Total		73,285,946

Of the colored oleomargarine produced, the tax of 10 cents per pound was paid upon 2,312,493 pounds, the remainder being exported free of tax.

It was further claimed that the production of oleomargarine for the months of July, August, and September of the present year shows a falling off in production from the corresponding months of the previous year, thus indicating a gradual destruction of the industry. To show that this is not the fact, but that the production of oleomargarine is always less during the summer than during the winter months, we print below a letter from the Commissioner of Internal Revenue, in which is set out the monthly production of both colored and uncolored oleomargarine from the time the present law took effect to October 1 of the present year:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, December 7, 1903.

Hon. H. M. HOYT,
Solicitor-General.

SIR: In compliance with your request of the 5th instant, I have the honor to state that the production of oleomargarine

taxed at the rate of 10 cents per pound and at the rate of one-fourth cent per pound, from July 1, 1902, the time the present law took effect, to November 1, 1903, is as follows:

Month.	Production, 10 cent tax.	Production, one-fourth cent tax.
1902.		
July	283,825	4,645,204
August	261,077	3,139,914
September	432,253	4,375,149
October	507,844	6,365,767
November	509,815	6,613,311
December	746,968	8,854,808
1903.		
January	603,834	7,346,436
February	556,606	6,356,339
March	598,163	6,355,464
April	541,628	6,362,625
May	356,650	3,742,080
June	311,744	3,416,592
July	284,828	3,268,805
August	285,261	3,502,618
September	281,053	4,268,993
October	322,077	4,987,703

Respectfully,

ROBT. WILLIAMS, JR.,
Acting Commissioner.

During the argument the question was asked from the bench whether an internal-revenue tax was now imposed upon other articles than tobacco and liquors. The list of articles is as follows:

OPIUM. Section 36 of the tariff act of October 1, 1890 (26 Stat., 567), imposed an internal-revenue tax of $10 per pound upon all opium manufactured in the United States for smoking purposes, and provided that no person other than a citizen of the

United States could engage in its manufacture. That act also imposed an import duty of $12 per pound upon all opium imported for smoking purposes.

Under the tariff act of July 24, 1897 (30 Stat., 153), the duty on opium imported for smoking purposes was reduced to $6 per pound. As a result, no opium for smoking purposes is manufactured in the United States.

FILLED CHEESE.—The act of June 6, 1896 (29 Stat., 253), after imposing special taxes on manufacturers and dealers in filled cheese, and after defining what should constitute filled cheese, imposed a tax of one cent per pound thereon. This act is now in force.

MIXED FLOUR.—Sections 35 to 47 of the war-revenue act of June 13, 1898 (30 Stat., 467), after defining "mixed flour," and after imposing special taxes on persons making, packing, and repacking the same, imposed a tax thereon of 4 cents per barrel; and, when such flour is imported, in addition to the import duties, the same internal-revenue tax shall be paid thereon.

This act is now in force.

PLAYING CARDS.—By the act of August 28, 1894 (28 Stat., 509), a stamp tax of 2 cents was imposed upon each pack of playing cards. This law is now in force.

The act of May 9, 1902 (32 Stat., 193), being the act amending the oleomargarine law, after defining "adulterated butter" and "process" or

"renovated butter," and after imposing special taxes upon the manufacturers and dealers therein, imposes a stamp tax of 10 cents per pound upon "adulterated" butter and a tax of one-fourth cent per pound upon "renovated" or "process" butter. This act is now in force.

I believe these are the only articles upon which an internal-revenue tax is at present laid. It is to be assumed that Congress, in selecting these subjects for taxation, has kept in view the general welfare of the people. It is also to be noted that Congress in imposing these taxes has laid them upon articles which are the objects of luxury or indulgences, or by means of which it is likely that fraud and deception will be practiced.

Where is the dividing line at which a law taxing oleomargarine loses its character as a revenue measure and becomes a regulation? Is it the point at which it is no longer possible to sell it in the market at butter prices and reap a good profit? If this be the true test, then the rate of tax which may be imposed will shift from time to time with the price of butter, a certain rate of tax being constitutional one day and unconstitutional the next. Oleomargarine, under its disguise, while also competing with the butter produced on the farm, competes especially with creamery butter. To compete with the butter from the farm it is packed in tubs as the farm butter generally is packed; in competing with creamery butter it is generally packed in prints and rolls

as that article generally is packed. Now it has occurred (and may occur again) that during the summer months farm butter has retailed in the market at from 10 to 12 cents per pound. Suppose that in order to secure a sufficient market for their product it would be necessary for the oleomargarine manufacturers to compete with farm butter at these prices, and they should insist that this could not be done if, say, the old rate of tax, 2 cents per pound, were exacted. Might they not insist, therefore, with equal force, that a tax of 2 cents per pound was unconstitutional because it made it impossible for them to sell their products at butter prices? If this law is to be declared invalid because the tax, in the opinion of the court, is excessive, at what rate may Congress constitutionally fix the tax?

The special brief for Cliff.

It is asserted in the brief filed by Mr. Harlan (p. 8) that to be oleomargarine within the terms of the act a given compound must have three characteristics: (*a*) It must be composed of some of the substances named in section 2 of the act; (*b*) it must be "made in imitation or semblance of butter;" and (*c*) when "made in imitation or semblance of butter," it must be "calculated or intended to be sold as butter or for butter." All three of these characteristics, it is said, must coexist in any compound before it can be said to be oleomargarine.

This proposition is untenable. To reach that conclusion counsel must read into the act something that is not there; or, he must give to the disjunctive conjunction "**OR**" the same meaning as the conjunction "**AND**." The language of section 2 is:

> "That for the purposes of this act," * * * "all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine," etc., * * * "made in imitation or semblance of butter, **OR** when so made, calculated, or intended to be sold as butter or for butter," "shall be known and designated as oleomargarine."

If the act had read, "made in imitation or semblance of butter, **AND**, when so made, calculated or intended to be sold as butter or for butter," then there would be some force in the claim. It is apparent that in using the word "**OR**," Congress intended that any of the named substances "made in imitation or semblance of butter" should be liable to the tax irrespective of whether it was made or sold or intended to be sold as oleomargarine or as butter. In other words, the sale, or the intent to sell, the compound "as butter or for butter," is not necessary to subject the compound "made in imitation or semblance of butter" to the payment of the tax.

The word "**OR**" is a disjunctive conjunction coordinating two or more words or clauses, each one of which in turn is regarded as excluding consideration of the other or others (Century Dictionary).

The position taken here by counsel for the Government is in full accord with the opinion of Attorney-General Garland of October 18, 1886 (18 Opin., 489), and the opinion of the Commissioner of Internal Revenue of January 12, 1903. The opinion of Judge Grosscup (125 F. R., 331) is in line with these rulings.

If it be true, as contended for by opposing counsel, that in order to subject oleomargarine to the payment of the tax it must have been made in imitation or semblance of butter, **AND** made with the intention to sell as butter, then it was idle for Congress ever to have passed the law; for no manufacturer of oleomargarine would admit that he made the article in imitation or semblance of butter for the purpose or with the intention of selling it "as butter or for butter." The burden would, in all cases, be on the Government to prove that intent before it could subject a single ounce of oleomargarine to the payment of the tax. It would be a futile and meaningless tax law.

As to the second proposition advanced by Mr. Harlan, it is sufficient to say that butter, as is well known, varies in color from the winter color (white with the faintest tinge of yellow) to June yellow. Any product, therefore, in imitation or semblance of butter of any shade of yellow, ranging from the winter to the June color, or more highly colored, is subject to the tax. As we have pointed out, the original oleomargarine was made out of the leaf or caul fat of cattle, which gave it a

somewhat resemblance in color and consistency to that of winter butter.

Mr. Harlan's next proposition is, in effect, that since vegetable oil is a statutory ingredient of oleomargarine, the use of any vegetable oil in the manufacture of oleomargarine, no matter how small in quantity or how great a coloration it imparts to the product, and no matter how deleterious to the wholesomeness of the product, does not constitute an artificial coloration within the meaning of the statute. The language of the statute is:

> All mixtures and compounds of tallow, beef fat, suet, lard, lard oil, VEGETABLE-OIL ANNOTTO, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter.

The court will observe that the words "vegetable" and "oil" are connected by a hyphen and that there is no comma between the word "oil" and the word "annotto;" and then follow the words "and other coloring matter."

It seems then that Congress, in using the term "vegetable-oil annotto," did not intend to class that product with the fatty substances, but with the coloring elements. The language means that "annotto" when produced from the arnotto tree (Century Dictionary) may be used as a coloring, but *not* when manufactured from coal-tar products. Originally annotto was produced wholly from the fruit of the arnotto tree; it is now also derived from coal-tar products.

The Government does not contend that the effect of the statute is to prohibit the use of substances other than those named, or that vegetable oils may not properly be used in the manufacture of oleomargarine. Some vegetable oils are, in fact, used. Whether they were being used in 1886, at the time of the passage of the original act, counsel is not now advised. But the Government does not concede that *all* vegetable oils may be used. What the Government claims is, that vegetable oils must be of such character as to be naturally adapted for use as food in the form in which used; they must be wholesome and palatable irrespective of the quantity used; otherwise they can not be said to be a *natural* ingredient.

Obviously there are many vegetable oils which are not fit for this use, and when unpalatable or unwholesome the manufacturers certainly would avoid them as ingredients, in large or small quantities, because they would injure the sale of the product. Similarly the commercial motive would prevent them from using an ingredient which is too costly, or unavailable for any other reason, like limited amount of supply. So, when they use a vegetable oil ingredient which is unpalatable or unwholesome, or partially deleterious, in such small quantities as to be negligible in its substantive effect, and the article gives a color, then not only is the intention clear, but the artificiality and the consequent violation of

the law are equally clear. That the article is a *natural* substance in general, produced by or from nature, instead of compounded by art, does not make it any the less artificial *quoad* the coloring of oleomargarine. It is probable that well-known artificial colors are "natural" in the same sense, and are harmless. I have always understood that they are made from carrots and other vegetable materials. This is what "vegetable-oil annotto" means. It is only the conjunction of the right color, for the forbidden use, in small quantities, with the vegetable oil origin, which leads the manufacturer to use palm oil, and permits Mr. Harlan to make his ingenious but untenable argument.

I have no doubt that many experiments have been made and are in progress to find an oil which may be used as a fit and natural food ingredient and which, when so used, will impart the desired color. It is obvious that many factors condition the problem—cost, supply, substantive effect upon the product, color, and the right *degree* as well as "*primary*" *relations* thereof (*i. e.*, between red, orange, yellow), because unless the color is concentrated the oil proportion would overbalance the solid elements and the necessary hard consistency would not be attained. A mere *yellow* oil like peanut oil, otherwise desirable, would not do.

So that the manufacturers in seeking to meet the law, or rather to evade it, take this highly colored and unfit vegetable oil, with an excess of

deleterious acids even when refined, and, finding in accordance with the laws of color that a dilution of red and orange produces yellow, and that this substance used in small quantities in oleomargarine yields that color, and does no injury (as it is claimed), because the deleteriousness is minute, assert that they are using a proper ingredient and that the color thereby imparted is not artificial. It is impossible to sustain this argument upon any reasonable view of the facts or any proper conception of legal logic.

It will be recalled that pink, in the New Hampshire case, was called a *discoloration*. Is not yellow also a discoloration of *oleomargarine?* Suppose a proper oil ingredient naturally gave a pink tinge, would that color, then, be discoloration?

Let us examine the question of the nature of palm oil, as shown by the evidence and by science. Is it really a *natural* ingredient of oleomargarine as claimed by opposing counsel? On page 97 of the brief for the Government the character of the oil is pointed out, the statement being based upon the finding of the Commissioner, the statements found in the works of the two chemists there mentioned and the testimony of the chemist Hoskins. Counsel asserts that this claim that palm oil is deleterious to health (brief, p. 12) is unfounded unless the *ex parte* statement of the Commissioner of Internal Revenue be regarded as evidence. The finding of that officer is in evidence (Cliff record, p. 9) and it is the finding

of an officer upon an official investigation while acting within the scope of his authority (section 14). This finding was made after investigation, with the aid of expert chemists provided by law, of the samples of palm oil submitted by Moxley, the manufacturer of the oleomargarine involved in this case; and we submit that that finding, under the law, is conclusive.

It is said the Government has overlooked the testimony of Professor de la Fontaine (Cliff record, p. 12). This witness states that palm oil "is quite as digestible as any other of the fats that we use for food," and that after being *refined* there would be no objection in using it in large proportions; but he understands the process of refining does away with most of the flavor and color, and that ultimately (not at present) refined palm oil will find its way on the market as a regular article of food; perhaps not in this country where we have lard in plenty and other fats, *but in other countries.* This is as much as to say that at present it has not found its way on the market as a *natural* ingredient of oleomargarine, but that in the future it may do so in countries where other fats are more expensive. I suppose he refers to east Africa, but we are not concerned with tastes and notions of hygiene there.

But the chemist Hoskins (Cliff record, pp. 10, 11) is not so sure about the wholesomeness and future use of palm oil. His statement is, that in his opinion "there is nothing deleterious or un-

wholesome in the use of palm oil in the proportion in which it was used in this formula"—that is, less than 1 per cent. That limitation implies that if used in a larger quantity it would be deleterious and unwholesome.

Referring to the works of the chemists, to which we have called attention, we find the following respecting palm oil (Lewkowitsch's "Chemical Anal. of Oils," 2d ed., p. 517):

> Palm oil is characterized by the *very* large amount of free fatty acids it contains. Even in the fresh state the proportion of fatty acids calculated as palmitic acid amounts to 12 per cent, and may, in older samples, reach as much as 100 per cent; in other words, the splitting up of the glycerides may become complete [that is, become acids]. I have found in a large number of commercial palm oils from 50 to 70 per cent of free palmitic acid. * * *
>
> The coloring matter of palm oil is bleached by exposure to air, or by heat, or by chemicals, such as chromic acid, etc. The two latter processes are adopted in practice for preparing bleached palm oil, which is almost colorless. By "chemical" bleaching the odor is destroyed, but it is not affected by heating to a high temperature. The coloring principle and the odor are not destroyed by saponification with alkalis or lime (candle manufacture); acid saponification, however (p. 746), destroys both.

See also Allen's "Chemical Organic Analysis," vol. 2, part 1 (3d ed.), page 161.

Apparently palm oil is more available as a material for soap and candles than for food.

From this it will be seen that the only proper way to refine the oil and render it wholesome is by chemical process. This destroys the odor *and the color* (the "desired" property) and perhaps takes away the offensive taste.

Evidently, then, the palm oil used in the oleomargarine involved in the Cliff case had not been refined in this proper sense, else it would not have imparted the color.

It seems useless to pursue the argument further. It is clear from the evidence and from the chemical authorities cited that palm oil in the condition in which it was introduced into this oleomargarine can not be regarded as a food product or as a natural or statutory ingredient of oleomargarine; and that, until chemically refined, at least, is unfit for human consumption. Having used only a sufficient quantity to give the product the "desired" color, the conclusion is irresistible that it was used solely for purposes of coloration and did not form, and was not intended to form, any part of the fatty ingredients; and that, therefore, such use constituted an artificial coloration within the meaning of the statute.

Mr. Harlan invokes the same authorities under the customs law which are quoted in Mr. Guthrie's

reply brief. If Mr. Harlan's argument were sound that on the test of the law itself palm oil is not an artificial coloration and therefore the Commissioner under his statutory authority can not decide contrary to the clear effect of the law, nor add anything to its terms, then his conclusion drawn from these decisions, that by a department regulation (or by executive decision) a law can not be contravened or enlarged, would be sound. But I submit that his conclusion falls with his premise, and that my comment (*ante*), on the decisions which are cited, embodies the true principle of this case, namely, that there is no defect or omission in the law which the taxpayer can legally take advantage of, and that the Commissioner is merely effectuating its plain terms and meaning and is not attempting through his finality of decision either to set the law aside, or to add to its scope, or to supply its omissions. He is doing nothing more than ascertaining facts under the law, and applying the law to the facts found.

Final suggestions.

Counsel, in reply to the suggestion from the bench that his argument against the constitutionality of any legislation which would destroy or greatly injure and embarrass a legitimate industry involves the necessity of contending that State legislation prohibiting or regulating the manufacture and sale of oleomargarine is unconstitutional, although this court determined otherwise

in the *Capital City Dairy* case, nevertheless maintained that proposition; and in seeking to illustrate it, and to enforce it, further claimed that even under the unlimited power over interstate commerce Congress could not prohibit an article from entering commerce and in that way injure or destroy its value or the business producing it. Is that proposition sound? And is it possible to maintain it in view of the decisions of the court? Of course there is a great difference between legitimate and illegitimate commerce, or between a legitimate and an illegitimate article of commerce. But the court has rendered no decision which would hamper the discretion of Congress in determining whether *any* particular article, whatever its character, should be excluded from commerce. At least it is certain that Mr. Guthrie's argument on this point necessitates the view that State legislation *prohibiting* the manufacture and sale of oleomargarine is unconstitutional.

The correlation between Federal and State powers which I endeavored to point out is this: The decisions of the court show that the Federal power must not encroach upon the State domain, nor the State power upon the Federal domain; that the State power of internal police must be left untrammeled by the one authority as well as the Federal power over interstate commerce, for instance, by the other; that the plain prohibitions respectively restraining either authority can not be evaded covertly or indirectly—such an *effect* of a

law is forbidden, whatever its guise; but that, along the line where the two powers approach each other, where under the particular facts the demarcation is not definite and clear, a *bona fide* exercise of power in either domain is not invalid because its consequences incidentally affect the other domain.

So in the *Plumley case*, for example, where, as in other State cases, the oleomargarine interests were urging the reverse of their proposition in this case and contending that the State law was a regulation of Federal commerce, the court approved the statement in *Sherlock* v. *Alling* (93 U. S., 99, 103), that legislation may affect commerce in many ways without constituting a regulation of it within the meaning of the Constitution, when the legislation is not directed against commerce and only indirectly and remotely affects it.

I suppose that principle applies to Federal legislation in its bearings upon *intra* State affairs and commerce as well as to State legislation in its effect upon *inter* State commerce.

In *Louisville and Nashville R. R.* v. *Kentucky* (161 U. S., 677) it was held that the State prohibition of certain railway consolidations was within the State police power. It was said that Congress would not have the power to authorize such consolidations in defiance of State legislation. Is there not a difference between such an authority or some prohibition similarly encroaching on State power, and a legitimate Federal law asserting a

Federal attribute or object, like a Federal tax command? The opinion in that case fully sustained the State police power when "invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests." How do the present cases interfere with that principle? Is it true because State laws have been sustained as *not* constituting restraint or interference *quoad Federal* power, or because Federal statutes may unlawfully run into the State preserve, that *this* Federal *tax* law, actually following and aiding indirectly the universal policy and laws of the States, must be stricken down?

The actual situation must be recognized. In the case of a State law not antagonized but aided by the effect of a Federal tax law, or in the case of non-action by a State, can it be successfully urged that a dormant State power, possible to exert in opposition to the general tendency of legislation throughout the country and to the indirect effect of the Federal tax law, although not actually so exerted, can control a power of the Government created by the Constitution? In the present case the State police power is not dormant except in the sense that the States might reverse their existing oleomargarine policy. The State power is not dormant; it has acted; but could a dormant and potential local authority thus absolutely control the Federal power of taxation?

The *Knight* case held (156 U. S., 1) that a monopoly of *production* did not restrain interstate *commerce*. That was because production is a matter wholly reserved to State control, and for that reason the indirect effect upon commerce among the States could be ignored. I presume if the interstate-commerce power, also exclusive, indirectly affected production, its legitimate exercise would be valid none the less, and for the same reason. It was held to be valid where it thus affected the right of contract,—also a matter of State control, in the Trans-Missouri and Joint Traffic cases. (166 U. S., 290; 171 U. S., 505.)

In other words, the argument is correlative—a rightful power legitimately exercised, either in the national or State field, is not invalidated because it may somewhat affect another subject falling under the opposite authority.

Here both sovereignties have the particular power—that is, of taxation—and one, the State, has the peculiar and exclusive authority of internal police regulation. Is the Federal tax law invalidated because of an indirect effect upon the industry within the State, especially when the law falls in with the State regulation? The case is sharply contrasted with the situation as to liquor, where the Federal tax law does not recognize local prohibitions, but permits and authorizes the sale and issue of Federal licenses in States which have forbidden the traffic entirely.

In fine, there is nothing in the case but the assertion that the *amount* of the tax invalidates it. In connection with that claim I desire to recall to the court the terms of the grant of power, explicitly and exclusively (among all the grants) recognizing the object of general welfare, which therefore enforces the taxing grant in a peculiar sense. If this amount is too great to be constitutional, where and how shall the line be drawn?

One may readily quote from the great announcements of the court, or from the utterances of distinguished public men weighty truths regarding the objects of governments, the exercise of their powers, and the principles of constitutions. The doctrines for which the Government stands in this case are as solemn, as sound, and as completely established as any principles which this court has settled in construing the Constitution.

And so it is appropriate to recall to the court, as a comment upon Mr. Guthrie's argument and the grave words of his conclusion, the impressive language of Chief Justice Marshall at the close of the remarkable opinion which he delivered in *Gibbons* v. *Ogden:*

> Powerful and ingenious minds, taking as postulates that the powers expressly granted to the Government of the Union are to be contracted by construction to the narrowest possible compass, * * * may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises,

> explain away the Constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind could pursue its own course, none would be perceived.

I respectfully submit that, regarding the constitutional question at least, and in the *McCray* case, if not in the Chicago cases, there is no objection on the score of jurisdiction; and that the judgments below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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